

Howard D. Burnett, ISB No. 3377  
HAWLEY TROXELL ENNIS & HAWLEY LLP  
333 South Main Street  
Post Office Box 100  
Pocatello, ID 83204  
Telephone: (208) 233-0845  
Facsimile: (208) 233-1304  
Email: hdb@htch.com

U.S. COURTS  
ON AUG 11 PM 4:33 W  
RECEIVED  
CLERK, U.S. DISTRICT COURT

Attorneys for Defendant/Cross-Defendent Engine Components, Inc.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

BROOK NEF, and NEF FLYING SERVICE, )  
INC., an Idaho corporation, )

Plaintiffs, )

vs. )

ENGINE COMPONENTS, INC., a foreign )  
corporation; TULSA AIRCRAFT ENGINES, )  
INC., a foreign corporation; AIRCRAFT )  
CYLINDERS OF AMERICA, INC., a foreign )  
corporation, )

Defendants. )

\_\_\_\_\_  
TULSA AIRCRAFT ENGINES, INC., a )  
foreign corporation, )

Counterclaimant, )

vs. )

BROOK NEF, and NEF FLYING SERVICE, )  
INC., an Idaho corporation, )

Counter-Defendants. )

Case No. CIV-04-362-E-BLW

REPLY OF CROSS-DEFENDANT  
ENGINE COMPONENTS, INC. TO  
CROSS-CLAIM OF CROSS-PLAINTIFF  
TULSA AIRCRAFT ENGINES, INC.

REPLY OF CROSS-DEFENDANT ENGINE COMPONENTS, INC. TO CROSS-CLAIM  
OF CROSS-PLAINTIFF TULSA AIRCRAFT ENGINES, INC. - 1

TULSA AIRCRAFT ENGINES, INC., a	)
foreign corporation,	)
	)
Cross-Plaintiff,	)
	)
vs.	)
	)
ENGINE COMPONENTS, INC., a foreign	)
corporation,	)
	)
Cross-Defendant.	)
	)
	)

Defendant/Cross-Defendant Engine Components, Inc. ("ECI"), by and through its counsel of record, Hawley Troxell Ennis & Hawley LLP, hereby admits, denies and avers in reply to Defendant/Counterclaimant/Cross-Plaintiff Tulsa Aircraft Engines, Inc.'s ("TAE's") Cross-Claim against ECI (the "Cross-Claim") as follows:

**I. FAILURE TO STATE A CLAIM**

1. The Cross-Claim fails to state a claim upon which relief can be granted.

**II. ADMISSIONS AND DENIALS**

2. ECI incorporates by reference, as though fully set forth herein, the entirety of ECI's July 19, 2004 "Answer of Defendant Engine Components, Inc. to Complaint; Demand For Jury Trial" (including, without limitation, all admissions, denials, averments and defenses set forth therein).

3. ECI denies each and every claim and allegation in the Cross-Claim, unless and only to the extent expressly admitted in this Reply.

4. ECI is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of the Cross-Claim, and therefore denies the same.

5. ECI denies the allegations contained in Paragraph 2 of the Cross-Claim, except admits that ECI's principal place of business is in Texas, admits that ECI has appeared in this lawsuit through its attorneys of record (Howard D. Burnett, Hawley Troxell Ennis & Hawley LLP, 333 South Main Street, P.O. Box 100, Pocatello, ID 83204), and avers that ECI is a Delaware corporation.

Subject Matter Jurisdiction and Venue

6. Insofar as the phrase "such claims" as used in Paragraph 3 of the Cross-Claim is undefined, ECI is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3 of the Cross-Claim, and therefore denies the same; however, if and to the extent that the undefined phrase "such claims" purports to refer to the allegations contained in Paragraphs 5 through 11 of the Cross-Claim, ECI admits the allegations contained in Paragraph 3 of the Cross-Claim.

7. Insofar as the phrase "such claims" as used in Paragraph 3 of the Cross-Claim is undefined, and insofar as the allegations contained in Paragraph 4 of the Cross-Claim pertaining to proper venue necessarily are dependent, in whole or in part, upon the nature of the claims being asserted by TAE, ECI is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4 of the Cross-Claim, and therefore denies the same; however, if and to the extent that the undefined phrase "such claims" as used in Paragraph 3 of the Cross-Claim purports to refer to the allegations contained in Paragraphs 5 through 11 of the Cross-Claim, ECI admits the allegations contained in Paragraph 4 of the Cross-Claim.

Facts

8. ECI denies the allegations contained in Paragraph 5 of the Cross-Claim, except admits that TAE from time to time has purchased new cylinders and pistons from ECI, but states

that ECI is without knowledge or information sufficient to form a belief as to the truth of the allegation that TAE purchased new cylinders and pistons from ECI specifically for the purpose of installing such components in an engine TAE was rebuilding for Brook Nef and Nef Flying Service, Inc (defined by TAE collectively as "Nef").

9. ECI denies the allegations contained in Paragraph 6 of the Cross-Claim, except admits that ECI manufactures and supplies new cylinders and pistons, but states that ECI is without knowledge or information sufficient to form a belief as to the truth of the allegation that ECI manufactured and supplied new cylinders and pistons that were used by TAE specifically for the undefined "engine in question."

10. ECI denies the allegations contained in Paragraph 7 of the Cross-Claim, including any express or implied allegation of any existence of any defective condition in any cylinders that may have been supplied by ECI to TAE.

11. ECI denies the allegations contained in Paragraph 8 of the Cross-Claim, including any express or implied allegation of any defects in any cylinders that may have been supplied by ECI to TAE.

12. ECI is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 9 of the Cross-Claim, and therefore denies the same.

#### Count I

#### Indemnification

13. For its response to Paragraph 10 of the Cross-Claim, and presuming that TAE intended to incorporate into Paragraph 10 of the Cross-Claim only Paragraphs 1 through 9 (rather than "1-10") of the Cross-Claim, ECI restates and realleges, as though fully set forth herein, its responses to Paragraphs 1 through 9 above.

14. ECI denies the allegations contained in Paragraph 11 of the Cross-Claim.

### **III. AFFIRMATIVE DEFENSES**

In asserting the following defenses, ECI does not assume the burden of proving any element(s) thereof which any applicable case law, common law, statute, rule, regulation or other authority places upon TAE and/or upon Plaintiffs Brook Nef and Nef Flying Service, Inc ("Plaintiffs").

#### **FIRST DEFENSE -- COMPARATIVE NEGLIGENCE**

15. TAE is barred from maintaining its Cross-Claim against ECI by reason of TAE's own negligence or other wrongful conduct which caused the crash and Plaintiffs' injuries and/or damages alleged in Plaintiffs' Complaint and Demand for Jury Trial (the "Complaint") herein. Alternatively, TAE's recovery, if any, should be reduced in accordance with Idaho Code § 6-801.

#### **SECOND DEFENSE -- NEGLIGENCE OF TAE, PLAINTIFFS, OTHER DEFENDANTS AND/OR NONPARTIES**

16. TAE is barred from maintaining its Cross-Claim against ECI because the crash and Plaintiffs' injuries and/or damages, if any, alleged in the Complaint were proximately caused, in whole or in part, by the negligence or other wrongful conduct of TAE, Plaintiffs and/or defendants other than ECI and/or of persons and/or entities not parties to this action.

#### **THIRD DEFENSE -- MISUSE, ABUSE OR IMPROPER USE**

17. TAE is barred from maintaining its Cross-Claim against ECI because the crash and Plaintiffs' injuries and/or damages, if any, alleged in the Complaint were proximately caused, in whole or in part, by the misuse, abuse or improper use of any cylinder(s) alleged in the Complaint and/or any cylinder(s) and/or piston(s) alleged in the Cross-Claim to have been manufactured by ECI.

#### FOURTH DEFENSE -- SUPERSEDING/INTERVENING CAUSE

18. TAE is barred from maintaining its Cross-Claim against ECI because the crash and Plaintiffs' injuries and/or damages, if any, alleged in the Complaint were proximately caused, in whole or in part, by the superseding, intervening acts and/or omissions of TAE, Plaintiffs and/or other persons and/or entities not parties to this action.

#### FIFTH DEFENSE -- UNAVOIDABLE ACCIDENT

19. The crash referred to in the Complaint, and Plaintiffs' alleged injuries and/or damages, if any, alleged in the Complaint to have resulted therefrom, were the result of an unavoidable accident, and TAE's Cross-Claim against ECI thus is barred.

#### SIXTH DEFENSE -- AVOIDABLE CONSEQUENCES

20. TAE's recovery in this action, if any, should be reduced in accordance with the doctrine of avoidable consequences.

#### SEVENTH DEFENSE -- MODIFICATION OF CYLINDER(S) AND/OR PISTON(S)

21. Upon information and belief, any cylinder(s) alleged in the Complaint and/or any cylinder(s) and/or piston(s) alleged in the Cross-Claim to have been manufactured by ECI and used in the engine purchased by Plaintiffs from TAE were substantially altered, modified and/or changed by a person or persons or by an entity or entities other than ECI after leaving ECI's control. Such alteration, modification or change was not reasonably foreseeable and was made by others over whom ECI had no control.

#### EIGHTH DEFENSE -- KNOWLEDGEABLE USER

22. Any cylinder(s) alleged in the Complaint and/or any cylinder(s) and/or piston(s) alleged in the Cross-Claim to have been manufactured by ECI were intended for, and sold to, a knowledgeable, sophisticated and informed user over whom ECI had no control and who was

fully informed as to the risks and dangers, if any, associated with the cylinder(s) and/or piston(s) and the precautions, if any, required to avoid such risks and dangers. Accordingly, ECI had no duty to warn the knowledgeable, sophisticated and informed user of the risks and dangers, if any, associated with such cylinder(s) and/or piston(s).

NINTH DEFENSE -- FAILURE TO JOIN INDISPENSABLE PARTY

23. TAE has failed to join indispensable parties, and its Cross-Claim against ECI should be dismissed based on Rule 12(b)(7) and Rule 19 of the Federal Rules of Civil Procedure.

TENTH DEFENSE -- REAL PARTIES IN INTEREST

24. TAE may not be the real party in interest with respect to the claims asserted in its Cross-Claim against ECI. Discovery in this case has not yet begun and may reveal the identities of the real parties in interest in this case. Rule 17(a) of the Federal Rules of Civil Procedure requires that every action be prosecuted in the name of the real parties in interest.

ELEVENTH DEFENSE -- NO DAMAGES

25. TAE has not been damaged by the alleged conduct of ECI.

TWELFTH DEFENSE -- LIMITATIONS ON DAMAGES

26. TAE's damages or losses, if any, are barred or limited by pertinent statutory and/or common law provisions providing limitations on damages.

THIRTEENTH DEFENSE -- ECONOMIC LOSS DOCTRINE

27. The relief sought by TAE in the Cross-Claim is barred by the economic loss doctrine.

FOURTEENTH DEFENSE -- FAILURE TO MITIGATE

28. TAE is barred from maintaining its Cross-Claim action against ECI because TAE, by failing to act reasonably, has failed to mitigate any damages to which TAE may be entitled.

#### FIFTEENTH DEFENSE -- COLLATERAL SOURCE

29. TAE's damages, if any, must be reduced by the Court pursuant to Idaho Code § 6-1606 in the event that any such award includes compensation for damages for which TAE has been compensated from collateral sources.

#### SIXTEENTH DEFENSE -- COMPLIANCE WITH INDUSTRY STANDARDS

30. Any cylinder(s) alleged in the Complaint and/or any cylinder(s) and/or piston(s) alleged in the Cross-Claim to have been manufactured by ECI complied with the state-of-the-art, all applicable industry standards, governmental laws, regulations and statutes, and were not defective or unreasonably dangerous at the time they left ECI's control.

#### SEVENTEENTH DEFENSE -- SOLE WARRANTY

31. If any warranties accompanied any cylinder(s) alleged in the Complaint and/or any cylinder(s) and/or piston(s) alleged in the Cross-Claim to have been manufactured by ECI, they were express warranties and constituted the sole and entire warranties being given, if any, superseding all implied warranties.

#### EIGHTEENTH DEFENSE -- EXPIRATION OF WARRANTIES

32. Any warranties that may have accompanied any cylinder(s) alleged in the Complaint and/or any cylinder(s) and/or piston(s) alleged in the Cross-Claim to have been manufactured by ECI have expired.

#### NINETEENTH DEFENSE -- FAILURE TO GIVE NOTICE OF BREACH OF WARRANTY

33. TAE is barred from maintaining its claim against ECI because TAE failed to give notice of any breach of warranty as required by Idaho Code § 28-2-607(3)(a) and/or as required by other statutes or judicial authority.



TWENTIETH DEFENSE -- NO OPPORTUNITY TO INSPECT

34. ECI did not have a reasonable opportunity to inspect, in a timely manner that may have revealed the existence of any alleged defective condition and/or evidence of misuse, abuse or improper use, any and/or all of the cylinder(s) alleged in the Complaint and/or the cylinder(s) and/or piston(s) alleged in the Cross-Claim to have been manufactured by ECI and used in the engine purchased by Plaintiffs from TAE.

TWENTY-FIRST DEFENSE -- LACHES

35. TAE is barred from maintaining its Cross-Claim against ECI based upon the doctrine of laches.

TWENTY-SECOND DEFENSE -- ESTOPPEL, WAIVER, UNCLEAN HANDS  
AND/OR SPOILIATION OF EVIDENCE

36. TAE is barred from maintaining its Cross-Claim against ECI based upon the doctrines of estoppel, waiver, unclean hands and/or spoliation of evidence.

TWENTY-THIRD DEFENSE -- OTHER CONTROLLING LAW

37. A law other than the law of Idaho may control the issues of liability and damages in this action, and ECI reserves the right to rely on any such law.

STATEMENT REGARDING ADDITIONAL DEFENSES

ECI is considering and believes that it may have additional defenses, but does not have sufficient information at this time to assert such additional defenses. ECI does not waive or intend to waive any such defenses, and specifically asserts its intention to amend its Reply to TAE's Cross-Claim if, pending research and after discovery, facts come to light giving rise to such additional defenses.

**PRAYER FOR RELIEF**

WHEREFORE, ECI prays for this Court's judgment against TAE as follows:

1. That TAE's Cross-Claim against ECI be dismissed, with prejudice, and that TAE take nothing thereby;
2. That ECI be awarded costs and attorney's fees under Rule 54 of the Federal Rules of Civil Procedure and Idaho Code §§ 12-120, 12-121 and/or other applicable statutes and rules; and,
3. That ECI be awarded such other and further relief as this Court may deem just and proper.

DATED this 11<sup>th</sup> day of August, 2004.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By: Howard D. Burnett  
Howard D. Burnett

Attorneys for Defendant/Cross-Defendant Engine Components, Inc.

**DEMAND FOR JURY TRIAL**

ECI respectfully demands a jury trial on all issues pursuant to Rule 38(b) of the Federal Rules of Civil Procedure.

DATED this 11<sup>th</sup> day of August, 2004.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By: Howard D. Burnett  
Howard D. Burnett

Attorneys for Defendant/Cross-Defendant Engine Components, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11<sup>th</sup> day of August, 2004, I caused to be served a true copy of the foregoing REPLY OF CROSS-DEFENDANT ENGINE COMPONENTS, INC. TO CROSS-CLAIM OF CROSS-PLAINTIFF TULSA AIRCRAFT ENGINES, INC. by the method indicated below, and addressed to each of the following:

Alan C. Stephens, Esq.  
THOMSEN STEPHENS LAW OFFICE  
2635 Channing Way  
Idaho Falls, Idaho 83404  
Fax: (208) 522-1277

☒ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Telecopy

Attorney for Plaintiffs/Counter-Defendants

Mark S. Geston, Esq.  
L. Jeff Severson, Esq.  
STOEL RIVES LLP  
101 S. Capitol Blvd, Suite 1900  
Boise, Idaho 83702  
Fax: (208) 389-9040

☒ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Telecopy

Thad T. Dameris, Esq.  
PILLSBURY WINTHROP LLP  
909 Fannin, 22nd Floor  
Houston, Texas 77010  
Fax: (713) 425-7373

☒ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Telecopy

Attorneys for Defendant/Counterclaimant/Cross-  
Plaintiff Tulsa Aircraft Engines, Inc.

  
Howard D. Burnett